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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of	)	MM Docket No. 92-309
	)	
LOCAL TELEVISION	)	File No. BPCT-911106KF
ASSOCIATES, INC	)	
	)	
CHARLES FITZGERALD	)	File No. BPCT-920114KF
	)	
WEBBER/MOORE BROADCASTING	)	File No. BPCT-920114KG
COMPANY LIMITED PARTNERSHIP	)	
	)	
For Construction Permit for a	)	
New Commercial Television	)	
Station on Channel 35 at	)	
Jacksonville, North Carolina	)	

To: Administrative Law Judge  
Joseph Chachkin

**MASS MEDIA BUREAU'S COMMENTS ON**  
**JOINT MOTION FOR APPROVAL OF SETTLEMENT AND RELATED PLEADINGS**

1. On February 1, 1993, Local Television Associates, Inc. (LTA), Charles Fitzgerald (Fitzgerald) and Webber/Moore Broadcasting Company Limited Partnership (Webber/Moore) filed a joint motion for approval of settlement. Concurrently, LTA filed a petition for leave to amend and request for authority to operate Channel 35 at Jacksonville as a satellite of LTA's existing station, WFXI(TV).<sup>1</sup> On February 5, 1993, the applicants filed a supplement to the joint motion and Fitzgerald filed a Technical Amendment. On February 9, 1993, Webber/Moore filed a supplement to the joint motion and LTA filed a supplement to its petition for leave to amend. The Mass Media Bureau hereby offers its comments on the above filings.

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<sup>1</sup> Also on February 1, 1993, the applicants filed a joint request for suspension of procedural dates.

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2. LTA has entered into settlement agreements with the competing applicants. The first agreement calls for the dismissal of the Webber/Moore application in exchange for monetary consideration. The second merges the LTA application with that of Fitzgerald.

3. The Bureau supports approval of the settlement agreement between LTA and Webber/Moore. A copy has been timely filed, the parties have established that approval of the agreement is in the public interest because it will facilitate prompt initiation of a new service in Jacksonville and neither application was filed for an improper purpose. Additionally, Webber/Moore has demonstrated that the monetary consideration it will receive does not exceed its legitimate and prudent expenses.

4. The agreement between LTA and Fitzgerald calls for the formation of a new company, Atlantic Ridge Telecasters, Inc. (ART),<sup>2</sup> which will receive the Jacksonville construction permit. LTA's shareholders will own 75% of ART's equity, in proportion to their equity interests in LTA. Fitzgerald will hold the remaining 25% of the equity. LTA's shareholders and Fitzgerald will share pro-rata the costs of obtaining the dismissal of the Webber/Moore application, the cost of prosecuting the ART application, as amended, and the cost of constructing the new

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<sup>2</sup> See LTA's supplement to petition for leave to amend filed February 9, 1993.

station should the permit be granted to ART. LTA's petition for leave to amend, filed concurrently with the instant petition for approval of settlement, adopts the Fitzgerald engineering proposal and amends the ownership section of LTA's application to reflect Fitzgerald's interest.

5. In its Memorandum Opinion and Order (MO&O), 6 FCC Rcd 2901, 2902 (1991), the Commission, reconsidered its Report and Order, 6 FCC Rcd 85 (1990) which amended Section 73.3525 of the Rules which deals with agreements to remove application conflicts. In its MO&O the Commission originally stated that it did not wish to impede the broader purposes and benefits that mergers may engender and that, therefore, it would not apply the settlement limitations adopted in the Report and Order to mergers.<sup>3</sup> The Commission warned, however, that because of its concern that mergers would be used to evade the payment restrictions applicable to non-merger settlements, it would "examine closely any proposal to settle among competing applicants by merger of the applicants to ensure that the merger is bona fide." Id. In determining whether a merger is bona fide, the Commission stated that it would follow the broad principles set forth in Venton Corporation, 90 FCC 2d 307 (1982). In Venton, the Commission said that it would examine

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<sup>3</sup> However, in Harrison County Broadcasting Company, FCC 92I-072, released September 8, 1992, the Commission disallowed reimbursement that exceeded a dismissing applicant's expenses even though the dismissing applicant was participating in an otherwise bona fide merger.

"such factors as the consideration to be paid to the surviving applicant, the form, timing and certainty of consideration to be paid to the dismissing applicant, and the nature of any involvement in the surviving applicant's business by the dismissing applicant." 90 FCC 2d at 313. Further, in its MO&O the Commission expressed its "heightened" concern with mergers where the dismissing applicant will receive cash and the payment is guaranteed regardless of the outcome of the business venture and where such payment would be in excess of the applicant's "out-of-pocket-expenses." 6 FCC Rcd at 2902. Finally, in its MO&O the Commission stated that it would be "inclined to disallow merger settlements that present a close question." Id.

6. In this case there appears to be a bona fide merger. Fitzgerald is required to share, in proportion to his equity interest, in the cost of constructing the new station and buying out the competing applicant. Fitzgerald therefore will share in the risk of ART. Whatever agreement is ultimately reached between LTA and ART with respect to allocation of income from operation of the station as a satellite will affect each of ART's shareholders in direct proportion to their equity interests in ART.

7. The Grade B contour of WFXI and the proposed Jacksonville station overlap. Section 73.3555(a)(3) of the Commission's Rules prohibits the grant of a license where any

such overlap exists. LTA contends that a grant of the Jacksonville facility to operate as a satellite of WFXI fully complies with the satellite exception to the television duopoly rules contained in Note 5 to Section 73.3555. Note 5 specifies that, where it can be shown that the common ownership, operation, or control of a satellite station would be in the public interest, the prohibition contained in Section 73.3555 will not be applied.

8. In its Satellite Policy Statement, 6 FCC Rcd 4212, 4213-14 (1991), the Commission stated that applicants for television satellite status may qualify for a presumption that satellite operation is in the public interest upon a "showing that: (1) there is no City Grade overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the satellite as a full-service station. Here, there is no city grade overlap and the proposed station would provide service to an underserved area.<sup>4</sup> Thus, the first two hurdles in qualifying for the presumption have been met.

9. To meet the third hurdle, LTA argues that the agreement

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<sup>4</sup> A community is considered underserved if there are two or fewer full-service stations licensed to it. Satellite Policy Statement, 6 FCC Rcd at 4215. Only one full time station, WUNM-TV, is licensed to Jacksonville. WUNM is a satellite of WUNC-TV, Chapel Hill, North Carolina.

between LTA and Fitzgerald to settle this case and operate the Jacksonville station as a satellite implies that the operation of the Jacksonville station as a full-service station is not economically feasible. LTA notes that the third applicant in this proceeding, Webber/Moore, states that it has determined that the market cannot support a stand-alone television station and has, therefore, agreed to dismiss its application for a portion of its expenses. LTA submits a Declaration by Millard S. Younts, a media broker familiar with the market. Younts states that he has made inquiries as to the purchase of a stand-alone UHF station in the Greenville-New Bern-Washington, North Carolina, market, where the Jacksonville station would be located, and received no indication of interest. Younts concludes that no informed and rational businessperson would be interested in the operation of a new, stand-alone, UHF in the market and that the only way such a station could be economically viable would be as a satellite of an existing VHF station in the market. LTA further contends that the history of the market warrants the conclusion that a full-service station could not survive. Specifically, LTA states that the market is already served by four VHF stations and that in 1992 an independent station, WYDO(TV) commenced operations. To be economically viable, LTA contends, WYDO(TV) has entered into an LMA, rebroadcasting WFXI(TV) during a substantial portion of the day. Moreover, LTA contends, the channel at issue in this proceeding is available only because a prior construction permit for the

channel was cancelled in March 1991. LTA also cites other construction permit applications in, and just outside, the Greenville-New Bern-Washington market which met similar fates.

10. In the Bureau's opinion, LTA has demonstrated that no alternative operator is ready willing and able to construct a full-service, stand alone, UHF television station on Channel 35 in Jacksonville. The Bureau agrees with LTA that this fact is confirmed by the settlement agreements reached in this proceeding and by the history of cancelled construction permits in and around the market. Cf. K2 Radio, Limited Partnership, FCC 93-19, released January 25, 1993.

11. Based on the foregoing paras. 4-10, the Bureau supports approval of the settlement agreement between LTA and Fitzgerald. Specifically, they have established that approval of the agreement is in the public interest and that their applications were not filed for an improper purpose.

12. The Hearing Designation Order (HDO), 8 FCC Rcd 321 (1993), noted that there was a discrepancy between the tower site coordinates specified in Fitzgerald's application and the coordinates for that tower specified by the Federal Aviation Administration. Because Fitzgerald had not supplied a final no hazard determination from the FAA for the coordinates specified in his application, the HDO included an air hazard issue against


the Fitzgerald application. Fitzgerald seeks to amend Section V-C 2(b) of his application (FCC Form 301) to correct his specified coordinates. The corrected coordinates conform to those of the FAA. Because the corrected coordinates are those of an existing tower, on which Fitzgerald intends to mount his antenna, there is no need for FAA notification. Under the settlement agreement, ART will propose the Fitzgerald site. In light of the correction of coordinates by Fitzgerald, there is no need specify an air hazard issue against ART.

13. In sum, the Bureau supports grant of the joint motion; approval of the settlement agreements; dismissal of the Fitzgerald and Webber/Moore applications; approval of the specified reimbursement to Webber/Moore; acceptance of LTA's interrelated petition for leave to amend its application to reflect its new ownership structure, change its name to ART and specify operation of the new Jacksonville station, utilizing the

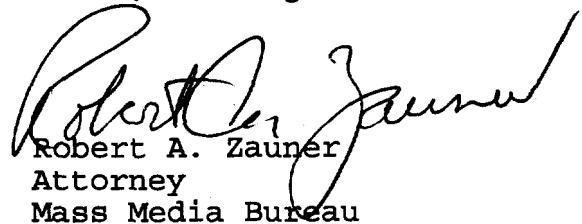


Fitzgerald site, as a satellite of WFXI; and grant of the ART application, as amended.<sup>5</sup>

Respectfully submitted,  
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February 19, 1993

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<sup>5</sup> Because the station will be operated as a satellite, the Bureau believes that imposition of the divestiture condition set forth in paragraph 8 of the HDO is no longer required.

**CERTIFICATE OF SERVICE**

Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has on this 19th day of February 1993, sent by regular United States mail, U.S. Government frank, copies of the foregoing **"Mass Media Bureau's Comments on Joint Motion for Approval of Settlement and Related Pleadings"** to:

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